A partial win for 'Topfree 7'

Judge to drop charges, but law constitutional

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Times-Union

It's all right for women to go topfree as a form of protest, but it's illegal for women to go topless in public areas.

That was the ruling of City Court Judge Herman J. Walz Jr., who yesterday dismissed indecent exposure charges against seven women arrested during a demonstration at Cobbs Hill Park last summer.

But he did not rule that the law was unconstitutional, which means that women who appear undressed above the waist may still be arrested unless they are engaged in a issue-oriented protest.

The women, who call themselves the "Topfree Seven," were arrested at the park June 21 when they bared their breasts to protest the state statute that prohibits women, but not men, from publicly exposing their bodies above the waist.

Prosecutor Thomas J. Brilbeck had maintained that the case simply involved a group of women who violated the law. But the women had asked Walz to consider more complicated constitutional and cultural questions and to strike down the law.

Brilbeck's major argument was that "it's the public's right not to be exposed to these acts," he said in an interview.

In an 18-page written decision released yesterday, the judge agreed with the prosecution that the law was enacted to protect the public.

But he also wrote that "as applied to defendants' conduct . . . the statute violates their rights to free expression as guaranteed by the federal and state constitutions."

Brilbeck said that he was not surprised by the decision, and said he will talk to appeals attorneys in the district attorney's office to determine whether an appeal of Walz's decision is warranted. Brilbeck added that since the charges against the women were dismissed, they could not appeal Walz's decision.

"I don't think its changes are that far-reaching," Brilbeck said of the decision. "It will not discourage the police from doing their job of enforcing

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the statute. The decision has no adverse affects on either the defendants or the People (prosecution)."

Walz's decision is not binding on Rochester's other city court judges.

The seven women and their attorneys were to hold a press conference later today to discuss the decision, said Mary Lou Scloss, who represented herself at the trial.

Besides Schloss, the other defendants in the case were Ramona Santorelli, Kathleen F. Reilly, Elise Jo Tooley, and Lynn Zicari, all of Rochester; and Nikki G. Craft of Oshkosh, Wis., and Debora A. Seymour of Astoria, Ore.

Since the law directly prohibits women from going topfree in public, the women claim it violated their constitutional right to equal protection and that the statute promotes "an unhealthy obsession with breasts as sexual objects."

But in his decision, Walz disagreed and ruled that the gender distinction does not "render the statute unconstitutional."

Tracing the history of the statute, Walz noted that it was originally directed at "curbing the phenomenon of topless waitresses."

Prior to 1983, the law had allowed men and women to appear on a beach without bathing suit bottoms, but directed that women leave their tops on. In 1983, in an attempt to eradicate nude beaches, the law was amended to forbid exposure in public places. The law, however, does contain provisions to allow breastfeeding in public and for breasts to be exposed for entertainment such as topless dancing.

The judge agreed with the prosecution's contention that the primary purpose of the statute was to regulate use of public areas.

"Although the state may not regulate private conduct, it may enforce standards as to public conduct, unless, of course, a fundamental right is involved," Walz wrote. "Here, there is no fundamental right to appear nude or top-free in public.

"...Today community standards, as perceived by the Legislature, regard the female breast as an intimate part of the body. Therefore, the state may legitimately enforce this standard by requiring that the female breast not be exposed in public places."

At their trial in September, the women presented several issues. They argued that this law, and others, continue to foster the public's unhealthy obsession with breasts.

District Attorney Howard R. Relin had asserted in the press that the statute protects women by preventing rape and sexual harassment.

In his decision, Walz discounted Relin's assertion. The judge said: "This argument can be dismissed out of hand. The state has no authority to limit a person's freedom merely because it may induce others to violate the law. This argument is another example of men attempting to protect women by denying women their freedom."

The women also argued that the law violates their rights "to determine their own physical appearance."

Walz ruled that even if that right did exist, it was subject to "reasonable regulation."

Citing several other cases that challenged the state law, Walz noted that the Topfree Seven case was the first to seriously challenge the law on the basis of sex discrimination.

Walz noted the recent Court of Appeals decision of The People vs. Robert Hollman. In that case, the state's highest court ruled that Hollman's constutuional right to free expression was not violated when he was arrested after sunbathing nude at Riis Park in Queens.

Despite Hollman's belief in naturism, the court ruled that the government may prohibit public nudity and regulate the use of public beaches for all citizens.

Walz wrote: "In contrast to the activity asserted in Hollman, defendants' activity of removing their shirts in Cobbs Hill Park not only was intended to convey a very particularized message about women's control over their own bodies, and about the sexism of gender-specific public exposure laws, but there was also a great likelihood that the message would be understood by those who viewed it."